

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OZZIE MCCULLOUGH,

Defendant-Appellant.

UNPUBLISHED

January 17, 2003

No. 234918

Wayne Circuit Court

LC No. 00-011584

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a second offense habitual offender, MCL 769.10, to 7 to 22½ years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but vacate his sentence and remand for resentencing.

At trial, a neighbor of the victim testified that at approximately 4:30 a.m. on September 19, 2000, she observed a man climb onto a chair and enter the victim's residence through a window. The neighbor called the police. Officers responded to the home and found a chair next to the house and underneath a "broken out" window. One of the officers entered through the broken window and opened the back door to admit the other officers that had responded. When inside, the officers observed that the home had been ransacked and noticed a trail of blood leading into a basement room. In that room, the officers located defendant, who had rolled himself up in a piece of carpeting and whose hand was bleeding. The officers arrested him. The officers eventually located a number of items on defendant's person, among which were collectors' coins and a Las Vegas type coin.

The victim testified that her home was locked when she left it on September 18. She stated that she first learned of the incident the next afternoon when she responded to a call from the police. The victim identified the coins removed from defendant as belonging to her and being located in her home before the incident. Further, the victim indicated that she was only casually acquainted with defendant, i.e., she knew defendant "[j]ust from the neighborhood," and that he did not have permission to be in her home or to possess the items that the police removed from his person.

In a statement given to police shortly after his arrest and again at trial, defendant maintained that he discovered the break-in and only entered the home for the purpose of helping

to clean up. Defendant testified that he was cut on his hand and sustained other injuries when he scuffled with police during the arrest. Defendant further testified that he had a relationship with the victim and that she had given him a key to the house that he used to let himself in the back door on the night that he was arrested.

On appeal, defendant challenges his conviction by claiming that the verdict was against the great weight of the evidence. Specifically, defendant seems to maintain that because the trial court found defendant's testimony unworthy of belief, the verdict was based on speculation or, at best, was supported by proofs consistent with a standard of a preponderance of the evidence, rather than beyond a reasonable doubt. Implicit in this argument is the notion that the fact-finder, in this case the trial judge, does not have the authority when weighing the credibility of the witnesses to reject completely the testimony of any witness found to be unworthy of belief. Defendant is wrong. The fact-finder at trial may weigh credibility and if persuaded that a witness's testimony is unworthy of belief may completely reject that evidence. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998) (it is well established that, where there is conflicting evidence, the issue of credibility ordinarily should be left to the trier of fact); *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997) ("questions regarding the credibility of the witnesses are for the trier of fact"). Here, the trial court did not err in concluding that defendant's testimony was unworthy of belief, relying instead on the evidence elicited from the prosecution's witnesses. Defendant's claim that the verdict was against the great weight on the grounds asserted is clearly without merit.

Defendant also argues that he is entitled to resentencing because the trial court failed to articulate any substantial and compelling reasons for exceeding the statutory sentencing guidelines and failed to inform him of his right to appeal on the basis of the departure from the those guidelines. In its brief on appeal, the prosecutor agrees that the trial court made no statement regarding its reasons for sentencing defendant above the guidelines, but suggests that remand for an articulation of those reasons is appropriate.

MCL 769.34(3) requires a trial court to articulate on the record substantial and compelling reasons for departing from the sentencing guidelines. *People v Hegwood*, 465 Mich 432, 439-440; 636 NW2d 127 (2001). Further, when imposing a minimum sentence that is longer or more severe than the range that the sentencing guidelines provide, the trial court must advise the defendant orally and in writing that the defendant may seek appellate review of the sentence on that basis. MCL 769.34(7); MCR 6.425(E)(4). Here, the record of the sentencing hearing is devoid of any indication that the trial court was aware of the fact that its sentence constituted an upward departure, the trial court did not articulate any reasons for departing from the guidelines, and the trial court did not specifically advise defendant on the record that his right to appeal includes the ground that the sentence imposed is longer or more severe than the range provided by the sentencing guidelines. Consequently, defendant's sentence must be vacated and the case remanded for resentencing.¹ Because remand is necessary for resentencing, we need not address defendant's other sentencing issue.

¹ We make no comment concerning the length of the sentence that the trial court imposed, but only determine that the trial court failed to articulate any reasons on the record for the upward departure from the guidelines.

Defendant's conviction is affirmed, but we vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage